Nos. 86-495, 86-624 and 86-625

In the Supreme Court of the United States

OCTOBER TERM, 1987

K MART CORPORATION, PETITIONER

v.

CARTIER, INC., ET AL.

47TH STREET PHOTO, INC., PETITIONER

v.

COALITION TO PRESERVE THE INTEGRITY
OF AMERICAN TRADEMARKS, ET AL.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

COALITION TO PRESERVE THE INTEGRITY
OF AMERICAN TRADEMARKS, ET AL.

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

In our opening brief, we demonstrated that the Treasury Department has reasonably interpreted Section 526, 19 U.S.C. 1526, to protect a U.S. trademark owner against importation of foreign-made goods bearing its trademark applied by an unrelated person without its consent – and *not* to protect a multinational enterprise against importa-

tion of its own goods into the United States for sale in competition with its preferred distribution arrangements. Respondents strive mightily to obscure this basic distinction between two quite different classes of cases, but it is consistent with the language of the statute and strongly supported by its legislative history, and it has been recognized by the Treasury Department for more than half a century.

A. The Treasury Regulation Is Consistent With The Language Of Section 526

This case is not disposed of by "plain language." The words of Section 526 are, as respondents contend (Br. 19), straight forward. But so are the words "Sleeping in this railway station is prohibited." And just as a court may legitimately inquire whether a passenger who falls asleep while waiting for his train has committed a misdemeanor within the meaning of the railway station ordinance,[1] so a court or agency may inquire whether Congress, when it prohibited importation of goods bearing a U.S. trademark without the U.S. owner's consent, meant to reach the case where the trademark was applied by the U.S. owner itself, or by its affiliate, or with its authorization.

In urging that Section 526 has been reasonably construed not to apply in a class of cases it might literally be read to reach, we are not, as respondents suggest (Br. 22), seeking to give plain words an "uncommon meaning." The Treasury regulation applies the plain words quite straightforwardly to bar importation in the class of cases with which Congress was explicitly concerned. It then refuses to apply them to a quite different class of cases that, in context, there is not the slightest reason to think Congress wanted to reach. That kind of decision, after an

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[1] The example is drawn from Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 664 (1958).

examination of "the provisions of the whole law, and * * * its object and policy" (*Pilot Life Ins. Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987) slip op. 10 (quoting earlier cases)), to interpret a statute as not encompassing every case its words might literally cover, is commonplace.[3]

In particular, a case may be within a plausible literal reading of a statute, but beyond its proper reach, where the relationship between two corporations changes the situation into one Congress did not intend to cover. In *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), the issue was whether Section 1 of the Sherman Act (15 U.S.C. 1) is applicable to an alleged conspiracy between parent and subsidiary. The resolution of this issue, the Court said, should depend not on "whether the term 'conspiracy' will bear a literal construction that includes parent corporations and their wholly owned sub-

[3] See U.S. Br. 11-14 & n.14. The principle is as old as *Heydon's Case*, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (K. B. Div. 1584) (Coke, J.), and is no less vital today. For example, this Court recently held in *California Federal Savings & Loan Ass'n* v. *Guerra*, No. 85-494 (Jan. 13, 1987), that a statute providing that pregnant women "shall be treated the *same* [as other persons] for all employment-related purposes" (42 U.S.C. 2000e(k) (emphasis added)) does not forbid special leave and reinstatement allowances. The Court explained that this narrowing interpretation is appropriate when the statutory langauge is examined "against the background of its legislative history and historical context" (slip op. 10). See note 7, *infra*. The Court held in *O'Connor* v. *United States*, No. 85-558 (Nov. 4, 1986), that a treaty exempting Panama Canal Commission employees from "*any* taxes * * * on income received as a result of their work for the Commission" (slip op. 2 (emphasis added)) does not exempt them from U.S. income taxation, citing "the contextual case" for ascribing a limited meaning to the language (*id.* at 4). In *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 848 (1975), the Court refused to treat "stock" in a cooperative housing project as a "security" for purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934 even though both statutes' definitions of "security" include "stock"; instead the Court construed the term "security", and hence the application of the two acts, in accordance with their purposes.

sidiaries" but on whether the "logic underlying Congress' decision to exempt unilateral conduct" (467 U.S. at 776) suggested that the statute should apply in such a case.[3] So here, the question is not whether Section 526 will bear a literal construction that would exclude the goods at issue but whether it was permissible for Treasury, charged with responsibility "to make such rules and regulations as may be necessary to carry out [the Tariff Act]" (19 U.S.C. 1624), to construe the statute as not reaching a class of cases there is no evidence Congress intended to reach.[4]

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[3] The Court refused to make " 'an artificial distinction' at the expense of substance" (467 U.S. at 763 (citation omitted)) and observed that "in reality a parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design' " (*id.* at 771 (emphasis in the original, citation omitted)). "They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests" (*id.* at 771-772 (footnote omitted)).

[4] An agency's determination to construe a statute—and its own authority—more narrowly than an alternative construction the words might literally bear obviously presents quite a different issue than respondents' favorite "plain language" precedent, *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986). See Resp. Br. 20, 49. In that case, the United States filed an amicus brief opposing a Federal Reserve Board interpretation that would "expand its jurisdiction beyond the boundaries established by Congress" (slip op. 12 n.6). Here there is no danger that, in respecting Treasury's longstanding judgment as to what Congress intended, a court would award Treasury wider power than Congress intended it to have. *Dimension*, of course, involved technical language ("deposits that the depositor has a legal right to withdraw on demand") that the legislative history (recited at slip op. 4) showed had been deliberately adopted to alter the rule (withdrawable "in actual practice" (*ibid.*)) that the agency had nevertheless sought to reimpose.

Amoco Production Co. v. *Village of Gambell*, No. 85-1239 (Mar. 24, 1987), also stressed by respondents (Br. 19), likewise involved a rejection by this Court *not* of a narrowing construction intended to reflect congressional intent but of an expansion of the reach of federal

The Treasury regulation at issue reflects a basic distinction that flows through all of trademark law: a trademark owner has the right to prevent others from using his mark on *their* goods but does not have the right, merely by virtue of owning the mark, to limit the resale of his *own* goods once he has put them into commerce.[5] Accordingly, the regulation interprets Section 526 as not applying where the U.S. trademark owner, although literally a "corporation or association created or organized within the United States" (19 U.S.C. 1526(a)), bears a specified relationship to the person who owns the trademark applied to the foreign-made goods (namely, that they are the same entity, or subject to common ownership or control, or the mark is applied with the authorization of the trademark owner).

The regulation interprets the statute as protecting a U.S. person who has acquired a trademark against imports of goods to which the same mark has been applied without his permission or involvement: the U.S. owner was already protected by Section 27 of the Trademark Act of 1905, ch. 592, 33 Stat. 730, against any "simulation" of his mark, but the Second Circuit had just held in *A. Bourjois & Co.* v. *Katzel*, 275 F. 539 (1921), that a mark held by an unrelated French company and lawfully applied in France could not infringe the U.S. owner's rights. As Judge

regulation beyond what Congress's words would bear. Moreover, the Court noted three times that the words in question ("situated in Alaska") had a "precise" meaning (slip op. 14, 15 & n.14) that the court of appeals had simply jettisoned. Even so, the Court examined the words in "the context of the Act as a whole" (*id.* at 16), and reviewed the legislative history, finding no evidence of an intention different from the "precise" meaning.

[5] See, *e.g.*, *Prestonettes, Inc.* v. *Coty*, 264 U.S. 359, 368-369 (1924); *Champion Spark Plug Co.* v. *Sanders*, 331 U.S. 125 128-130 (1947). Judge Sneed recently explained this principle and its relationship to parallel importation in *NEC Electronics* v. *Cal Circuit Abco*, 810 F.2d 1506, 1509-1510 (9th Cir. 1987). See generally 3A R. Callman, *The Law of Unfair Competition, Trademarks, and Monopolies* § 21.13, at 62 (L. Altman 4th ed. 1983 & Supp. 1987).

Learned Hand, a distinguished student of intellectual property matters, said at the time, Section 526(a) "was intended only to supply the casus omissus, supposed to exist in section 27" (*Coty, Inc.* v. *Le Blume Import Co.*, 292 F. 264, 268-269 (S.D.N.Y. 1923)).

The regulation interprets the statute as not giving the U.S. trademark owner the right to bar entry of goods it itself, or its affiliate, has trademarked and placed in foreign commerce. That would go well beyond the "casus omissus" and place public enforcement machinery behind the efforts of a multinational enterprise to confer exclusive U.S. distribution rights on one of its components. Contrary to respondents' confusing suggestion (Br. 21), neither the regulation nor our argument depends on any broad distinction between a multinational enterprise headed by a U.S. firm and one headed by a foreign firm: to take their example, there is not the slightest evidence that Congress wanted to give "General Motors" (*ibid.*) the right to manufacture cars abroad, apply its own trademarks to them, and then, by the very act of applying those marks, deny U.S. consumers access to the foreign-manufactured cars.[6]

[6] The foreign ownership paradigm is, of course, the one on which this case has focused. As the court of appeals noted (Pet. App. 1a), the present issue "typically arises when a foreign producer creates an American subsidiary that then registers the American trademark." Indeed, two of the named respondents, Cartier, Inc. and Charles of the Ritz, Ltd., are wholly owned domestic subsidiaries of foreign corporations. See Resp. Br. ii. The third respondent, COPIAT, is a trade organization established to promote the trademark interests of multinational entities. See Resp. Br. Addendum 10a-11a (listing members).

We do not suggest that it is improper for a multinational enterprise to attempt, by differences in products, distinctive labeling, or contractual arrangements, to prevent the flow of goods intended for foreign markets into the United States. The issue in this case is simply whether the Treasury Department has properly construed Section 526 as not giving them an additional resource for doing so.

B. The Legislative History of Section 526 Strongly Supports Treasury's Intepretation

When one reads Section 526 in the context of its purpose and history, Congress's intentions and the consequent reasonableness of the Treasury Department's regulation become apparent. As we explained in our opening brief (at 13-14) and respondents are obliged to concede (Resp. Br. 25), Congress enacted Section 526 as a hastily drafted reaction to the Second Circuit's decision in *A. Bourjois & Co.* v. *Katzel*, 275 F. 539 (1921), rev'g 274 F. 856 (S.D.N.Y. 1920), rev'd, 260 U.S. 689 (1923). Its only stated purpose was to reverse that decision and give protection to the plainly legitimate expectations of U.S. firms that, like Bourjois, have acquired U.S. trademark rights from a foreign manufacturer. There is no evidence that Congress intended, nor any reason why Congress would have wanted, to confer on a foreign manufacturer (or a U.S. manufacturer with a foreign subsidiary) government assistance in keeping its own goods out of the United States. Compare *California Federal Savings & Loan Ass'n* v. *Guerra, supra.*[7]

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[7] As we explained in our opening brief (at 13-14), this case is remarkably similar to *Guerra*. In both cases, Congress enacted broadly worded legislation in response to a particular judicial precedent; here, as there, the statutory words should be read against that background and in light of Congress's objectives. But this case seems to us much the easier: the statutory words involved in *Guerra* were more nearly directed to the precise question at issue – comparability of treatment of employees – than the words of Section 526 are to the issue of parallel importation of the goods of a multinational enterprise.

Respondents cannot challenge the principle, stated once again in *Guerra*, that " 'a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers' " (slip op. 10-11, quoting earlier cases). Instead, they argue (Resp. Br. 36) that *Guerra* involved clearer legislative history. But in fact the cases are quite similar (and *Guerra* is the

Respondents do not seriously contend that Congress intended to assist transnational enterprises in sealing the U.S. border against their own foreign-manufactured goods. Instead, respondents argue that the purpose of Section 526 was a " 'sweeping rejection of prevailing legal doctrine' * * * in favor of territorial protection of a United States-owned and registered trademark" (Resp. Br. 26 (quoting Pet. App. 15a)). There are two things wrong with that theory.

First, even if respondents were correct that Congress in 1922 embraced the "territoriality" theory of trademark—the theory that "the source and scope of trademark protection arise from the law of a particular sovereign state" (Pet. App. 13a)—that would not answer the question in this case. No one contends that the goods in question here are not excludable simply because the mark they bear states their origin "accurately" in some abstract sense. Everyone agrees that the rights of the U.S. trademark owner arise from, and only from, U.S. positive law. The question is whether the rights Section 526 affords to a U.S. trademark owner include the right to exclude goods bearing a trademark it itself (or its affiliate) applied to them. The territoriality theory, which says nothing about how any particular sovereign should treat the relationship between the particular entity that owns the mark and its parents or subsidiaries, does not answer that question.[8]

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harder case) on that point as well: in *Guerra*, there was clear evidence of what Congress *did* want to do, but the Court's conclusion that Congress did *not* intend to reach an additional class of cases the statute might literally cover was based (see slip op. 11-16) on the absence of evidence of such intent and on inferences from circumstances; here, as we argued in our opening brief (at 14, 29), the inference is a good deal stronger that the 1922 Congress did not intend, without saying so, to give multinational enterprises an additional weapon to enforce exclusive U.S. distribution arrangements.

[8] As we noted in our opening brief (at 16), the Second Circuit's *Katzel* decision did deny excludability because the mark on the

Second, there is no evidence whatever that Congress thought it was adopting anything more than a narrow import-exclusion measure to protect American firms in the *Katzel* situation. Section 526, by its terms, deals with imports. It does not adopt, reject, or redefine trademark principles of any kind. There is no mention whatsover in the statute or anywhere in its legislative history of the respondents' "territoriality" doctrine. Instead (as we detail in our opening brief, at 16-31), the legislative record repeatedly demonstrates that Congress enacted Section 526 to protect a U.S. firm that has purchased U.S. trademark rights from a foreign manufacturer and then encounters competition from importers of identically marked goods.[9]

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imported goods identified their origin "accurately" in an abstract sense. But our argument in this case does not rest on any such contention, nor is this Court's subsequent opinion in *Katzel*, which did not mention Section 526, in any way inconsistent with our position in this case. This Court's finding of trademark infringement in *Katzel* rested squarely on the finding that, under U.S. trademark law and the facts of that case, the mark indicated that the goods came from the U.S. plaintiff and *not* from the unrelated French firm. 260 U.S. at 692. Justice Holmes made that clear the following year in *Prestonettes, Inc.* v. *Coty*, 264 U.S. 359, 368 (1924). Neither the "territoriality theory" nor the opinion in *Katzel* says anything about the effect on the rights of a U.S. trademark owner, under U.S. law, of actions taken abroad, by itself or other members of its corporate family, with respect to goods that later enter the United States. In particular, neither the territoriality theory nor *Katzel* suggests in any way that the members of a multinational family of corporations are entitled to be treated for trademark purposes as if they were unrelated. See, *e.g.*, *NEC Electronics* v. *Cal Circuit Abco*, 810 F.2d 1506 (9th Cir. 1987).

[9] For example, the House Conference Report specifically alludes to the Second Circuit's *Katzel* decision and states that the provision "makes such importation unlawful" (H.R. Conf. Rep. 1223, 67th Cong., 2d Sess. 158 (1922)). See U.S. Br. 17, 27-28. And the legislation's sponsors repeatedly explained that Section 526 was meant to serve the narrow purpose "of protecting the property rights of American citizens who have purchased trade-marks from foreigners"

Lacking any evidence at all that Congress intended to give them the benefit they now seek, respondents assert grandly that the "broad meaning of Section 526 is confirmed by the historical context in which it was enacted" (Resp. Br. 24). But the chief element of their "historical context" turns out to be the fact that this Court reversed the Second Circuit's decision in *Katzel* and "adopted what is known as the 'territoriality' theory of trademarks" (*id.* at 24-25). Since the adoption of Section 526 preceded this Court's decision in *Katzel*, Congress obviously was not ratifying that decision. More important, as we have just explained, see pages 8-9, *supra*, neither this Court's decision in *Katzel* nor the "territoriality" theory answers the question in this case, which is whether Section 526 *gives* the U.S. trademark owner the right to exclude goods to which it itself, or its affiliate, has applied its trademark.

Respondents also attempt to rewrite the legislative record. They first contend that the Conference Committee, though discussing the court of appeals' *Katzel* decision in the import exclusion context, actually selected the case as its "vehicle" for destroying the "doctrine of universality" (Resp. Br. 26-27). But the Conference report—like the rest of the legislative history—contains no discussion of trademark concepts and makes not the slightest mention of respondents' "universality" and "territoriality" doctrines. To the contrary, the report quite plainly recognizes that the question in *Katzel* was whether Bourjois could "prevent the importation"(H.R. Conf. Rep. 1223, *supra*, at 158) of Katzel's merchandise. The report explains that Section 526 "makes such importation unlawful" in order to "protect the American manufacturer

(62 Cong. Rec. 11603 (1922) (Sen. Sutherland)). This point was repeated, literally or in substance, no less than eight times by four different senators in the course of a ten-minute debate. See U.S. Br. 18-20 & nn. 23-24.

or producer" (*ibid.*). The report shows no intention whatsoever to redefine the character or concept of a trademark.[10]

Respondents' attempt to explain the 1922 legislative debate fares no better. Respondents acknowledge that the sponsors of Section 526 described the statute as having very limited objectives, but they contend that these statements should be disbelieved (Resp. Br. 28). Respondents suggest that the sponsors did not give their Senate colleagues an honest description of their amendment but instead "naturally tried 'to understate its significance' " (*ibid.*) and "went so far as to blur one of the targets" (*ibid.*). Respondents simply refuse to take the sponsors at their word (*id.* at 29-31). The resulting arguments are, in any event, unconvincing.[11]

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[10] Respondents also discount (Br. 27) the Conference report's express statement that Section 526 would protect the "American manufacturer or producer" (H.R. Conf. Rep. 1223, *supra*, at 158) because Bourjois (though wholly American) was not a manufacturer or producer. One may debate whether Bourjois was a manufacturer or producer; it hardly matters, given that other wholly American companies that Congress intended to protect (such as the American purchaser of the Bayer trademark (62 Cong. Rec. 11604 (1922)) certainly were. What remains crystal clear is that the Conference Committee wanted to protect American firms against importation of goods bearing their trademarks applied by unrelated persons without their consent, and gave no evidence of wanting to protect transnational enterprises against importation of their own goods.

[11] Indeed, respondents' arguments support our submission that Congress meant to address the *Katzel* situation, and had no intention that Section 526 would be applied outside of the case of a U.S. trademark owner seeking to exclude goods bearing his mark applied by an unrelated person without his consent. For example, respondents concede that the "Wonder Flour" colloquy demonstrates that the sponsors "had apparently not considered" the application of Section 526 in that situation (Resp. Br. 29). That is our very point. As we explained in our opening brief (at 20 n.24), the sponsors' prompt revision of

As we said in our opening brief, the 1929 debate "says little about the perceived scope of Section 526, and what it does say further confuses the picture" (U.S. Br. 25; see *id.* at 29-31). Respondents try (Br. 32-36) to glean significance from the debate about the ultimately rejected amendment that would have deleted the consent clause, but it proves almost nothing. First, as respondents acknowledge, Congress ultimately reenacted Section 526 without change, so the question remains what Congress intended in 1922, not 1929. Second, the Senators who discussed the proposed amendment were not concerned *either* with protecting independent U.S. trademark owners in the *Katzel* situation *or* with assisting multinational corporations to seal off the U.S. market (an objective for which there is not the slightest hint of congressional desire). They were concerned with an entirely different objective, essentially unrelated to trademark protection, for which (as Congress ultimately decided) Section 526 was a wholly unsuitable vehicle: discouraging U.S. companies from locating

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Section 526 in response to the suggestion that Section 526 might be employed in a non-*Katzel* situation demonstrates the sponsors' limited objectives.

As another example, respondents acknowledge that the Lenroot-McCumber colloquy reveals that the sponsors did not intend to extend special benefits to a " 'foreigner' " who owns and registers the U.S. trademark; they intended that Section 526 would apply only when the trademark is " '*owned exclusively* by an American firm or corporation' " (Resp. Br. 30 (emphasis added), quoting Pet. App. 18a, which is turn quotes Senator McCumber)). Once again, respondents have made our point. This protectionist Congress obviously was interested only in granting import exclusion privileges to wholly domestic interests. See U.S. Br. 20-23, 28-29. Indeed, if (as respondents earlier argued) the sponsors were attempting to redefine trademark infringement concepts, their distinctions between foreign and domestic companies would be inconsistent with existing treaties and statutes, which, then as now, gave foreign and domestic trademark owners equal protection from infringement. See Convention of the Union of Paris for the Protection of Industrial Property, June 2, 1911, art. 2, 38 Stat. 1660-1661; 15 U.S.C. 1051; U.S. Br. 12 n.13.

manufacturing plants abroad. Third, it is at best not clear whether Senator Reed and others who participated in the debate, not focusing on the intricacies of the protection of trademark owners but apparently expecting to seize on existing Section 526 and use it for their purposes, believed the section as it stood barred a multinational firm from importing its own goods unless it went through the formality of consenting in writing to its own importation.[12] It is certainly more consistent with what Senator Reed actually said (existing Section 526 protects the American trademark owner "against importations of articles which have been stamped with his mark without his consent" (71 Cong. Rec. 3873 (1929)) to conclude, as we suggested in our opening brief, that he expected only that a barrier to entry would arise as a consequence of his ultimately rejected proposal. The important point remains: while the Hawley-Smoot Congress most certainly did want to erect barriers to importation of foreign-manufactured goods, there is no evidence that anyone in Congress in 1929, any more than in 1922, wanted to give transnational enterprises a new weapon that they could use to prevent competition with their authorized distribution systems.

C. The Treasury Department's Regulation is a Reasonable Interpretation of Section 526

As we explained in our opening brief (at 31-36), the Treasury Department promulgated the regulation at issue to ensure that Section 526 is applied in accordance with Congress's objectives. Respondents reply that Treasury lacks authority to promulgate such regulations (Resp. Br. 37) and, alternatively, that the regulation here is invalid

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[12] We can find no statement by Senator Reed that American companies that manufactured goods overseas were compelled to rely on Section 526's consent clause to import their own trademarked goods. Respondents' assertion (Br. 33) that Senator Reed held that view is their inference.

because it does not conform to the literal terms of the statute (*id.* at 48-50). Both contentions are incorrect.

As we have explained (U.S. Br. 31), Congress has expressly empowered the Treasury Department, through Section 624, to "make such rules and regulations as may be necessary to carry out the provisions of this chapter." 19 U.S.C. 1624. Respondents concede this authority (Resp. Br. 37-38), but argue that it does not permit Treasury to enact rules explaining how Section 526 should be applied.[13] But the authority to adopt regulations "necessary to carry out" Section 526 plainly includes the power to list the cases to which, in the agency's judgment, the statute does and does not apply, and to revise the list in response to new circumstances and the experience gained in the course of applying the statute: Treasury has no choice but to interpret the statute whenever new situations, beyond Congress's express contemplation, are presented. Respondents' contention that Section 526 does not "invite agency interpretation" (Resp. Br. 37) misconceives the issue: even in the absence of an express or implied delegation of policy-making authority, when an expert agency is charged with administering a statute, its interpretation of Congress's intentions, based in part on its more-than-ordinary knowledge of the subject matter, is entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

The real question here is whether Treasury's present regulation is a "reasonable" interpretation of Section 526. *Chevron U.S.A. Inc.*, 467 U.S. at 845. As we have explained (U.S. Br. 31-36), the regulation amply satisfies the

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[13] Respondents consistently refer to the *Customs Service's* authority to promulgate regulations (see, *e.g.*, Resp. Br. 37, 38, 39). Section 624 expressly delegates authority to "the Secretary of the Treasury" and the Treasury Department has retained authority over the exercise of that power. See U.S. Br. 31 n.37.

Chevron standard. It is clear from the legislative materials that: (1) Congress wished to protect U.S. trademark owners against importation of goods bearing their marks applied by unrelated persons without their consent (see U.S. Br. 18-20); and (2) Congress expressed no desire (and had no reason to wish) to assist multinational enterprises in keeping their own goods out of the U.S. market (see *id.* at 20-23 & n.26). Treasury's regulation provides the protection Congress explictly intended to give, while excluding cases that, as best the agency can determine, Congress had no intention to reach.

At bottom, respondents' sole objection is that the regulation "ignore[s] the words of the statute" (Resp. Br. 50). But Treasury's regulation is not a departure from literalism except in a sense in which such departures are commonplace: the addition of words of limitation to exclude a class of cases that Congress did not contemplete but would have intended not to cover.[14]

D. The Treasury Department's Regulation is Entitled to Particular Deference in this Case

As we explained in our opening brief (at 36-46), the Treasury Department's interpretation is entitled to particular deference in this instance because Treasury's inter-

[14] There is nothing unreasonable in reading Section 526's phrase "bears a trademark" with the implicit contextual qualification "not applied by the U.S. owner, or its affiliate, or with its consent." Such an interpretation is every bit as faithful to the statutory language as reading the phrase "any taxes * * * on income" with the implicit contextual qualification "but not U.S. income taxes" (see *O'Connor* v. *United States*, No. 85-558 (Nov. 4, 1986), slip op. 2), or reading the phrase "any * * * stock" with the implicit contextual qualification "but not stock that represents ownership of an apartment building by its occupants rather than an investment" (see *United Housing Foundation* v. *Forman*, 421 U.S. at 848-850), or, more hypothetically, reading the sign "No Vehicles in the Park" with the implicit contextual qualification "but wheelchairs, infant carriages, and the jeep on the war memorial are allowed." See Fuller, *supra*, 71 Harv. L. Rev. at 662-664.

pretation has remained essentially unchanged for over 50 years (and the very regulation has been in place for 15 years) and because domestic retailers have placed substantial and justified reliance on that interpretation. Respondents' arguments to the contrary are without merit.

Respondents attempt to characterize the Treasury Department's interpretation as "uncertain" and "wavering" (Resp. Br. 37). But the regulatory history (which is set forth much more completely and accurately in our brief, at 37-41) disproves that assertion. During the past one-half century, consistent with the basic notion that a trademark has never given its owner a right to restrict later distribution of its own goods after it has sold them, the Treasury Department's regulations have at all times denied Section 526's protection where the foreign and domestic trademarks owners are the same or closely related firms. Indeed, there have been only *four* substantive regulatory revisions over the past 50 years, and those four changes have not altered the Treasury Department's basic interpretation. To our knowledge, Treasury has *never* consciously allowed U.S. components of multinational enterprises, such as respondents Cartier and Charles of the Ritz, to invoke Section 526 to exclude those enterprises' own goods.[15]

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[15] From 1922 to 1936, the regulations did not address the "same company" issue. We are aware of no instance during this era of a multinational firm employing Section 526 to enforce its exclusive U.S. distribution scheme; there is no reason to believe the issue ever arose. From 1936 to 1953, the Treasury Department regulation permitted importation of trademarked goods when the foreign and domestic trademark owner were the "same person," a phrase understood to include parent and subsidiary. See J.A. 52-54, 62-63. From 1953 to 1959, the regulation contained the somewhat broader term "related company." From 1960 to 1972 and then from 1972 to the present, the regulation has permitted importation in common ownership or control situations. See U.S. Br. 37-41.

Respondents' examples of "inconsistencies" are, for the most part, relatively minor quibbles that simply underscore the continuity of Treasury's interpretation.[16] Respondents' argument is perhaps most strikingly inadequate in its failure to point out where the *Treasury Department* has demonstrated inconsistent behavior. Respondents build their claims upon isolated statements or contrary actions by far-removed entities, such as the now-defunct Tariff Commission (Resp. Br. 43) and "the collector of customs in Chicago" (*id.* at 46).[17] The fact of

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[16] Indeed, respondents primarily challenge the form, and not the content, of the regulations. For example, their chief contention is that the Treasury Department failed to specify with sufficient clarity that its 1936, 1943, and 1953 regulations were based on Section 526 (Resp. Br. 42-44). But Treasury, which most assuredly is the relevant authority on such matters, has always contended that its regulations are based on Section 526. It specifically cited its reliance on Section 526 in its 1936 and 1943 regulations (U.S. Br. 37-38), and contemporary commentators understood that the 1953 regulations were based on that statutory section (*id.* at 38 n.47). Respondents' description (Resp. Br. 45-46) of the *Guerlain* litigation and the Treasury Department's consequent regulatory revision is misleadingly incomplete; we refer the Court to our opening brief (at 39-40 n.48) for a full explanation of that revision. We simply add that, contrary to respondents' assertion (Resp. Br. 46 n.35), the United States' decision to seek clarifying legislation in the wake of *Guerlain* was not inconsistent with our inference that the Customs Service felt constrained to grant statutory protection in that case because it lacked sufficent information to make a "related company" determination. Treasury had previously recognized that clarifying legislation would be helpful; this case simply confirmed that general consensus. See U.S. Br. 39 n.48.

[17] We believe that Treasury can be faulted on only one score. In 1983, without Treasury's knowledge or approval, the Customs Service signed an amicus curiae brief that took a position partially inconsistent with the Treasury Department's regulations. See Pet. App. 27a. The Treasury Department was apparently remiss in failing to review the litigation activities of a subordinate agency, but that isolated failure is hardly a reason to ignore 50 years of consistent official policy.

the matter is that Treasury, for the past 50 years, has uniformly rejected the position respondents advocate here. A statutory interpretation that has been consistently recognized for so long acquires a significance that is "simply beyond peradventure." *Herman & MacLean* v. *Huddleston,* 459 U.S. 375, 380 (1983).[18]

Finally, respondents describe our suggestion that Section 526 is entitled to special respect in light of the substantial reliance interests that have developed over the years as "novel" and "without merit" (Resp. Br. 57). It is neither. This Court has repeatedly recognized that longstanding agency regulations are entitled to respect because of the "substantial reliance interests" they generate. See, *e.g., Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 457-458 (1978); *Udall* v. *Tallman,* 380 U.S. 1, 18 (1965); *McLaren* v. *Fleischer,* 256 U.S. 477, 481 (1921); see also *Commissioner* v. *Fink,* No. 86-511 (June 22, 1987), slip op. 4 (Stevens, J., dissenting) ("once a statute has been consistently interpreted in one way, there are institutional and reliance values that are often even more important than the initial goal of accurate interpretation"). In this instance, Treasury's interpretation of Section 526 has long been an "element of the settled legal context" (*Square D Co.* v. *Niagara Frontier Tariff Bureau,* No. 85-21 (May 27, 1986), slip op. 14), and domestic retailers have justifiably relied on that interpretation in their commercial dealings. Those retailers include many small businesses that have staked their financial livelihoods on what they quite reasonably have considered to be settled legal rules. See 133 Cong. Rec. S5525 (daily ed. Apr. 27,

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[18] We further observed in our opening brief (at 41-42) that Congress has revisited Section 526 on numerous occasions over the past fifty years, has never stated any disagreement with the Treasury Department's regulations, and, in fact, has acknowledged them with apparent approval. These subsequent legislative events are strong additional evidence of the reasonableness of Treasury's interpretation.

1987) (Sen. Chafee). Respondents' contentions that these retailers are "free-riding" (Br. 57) are, by contrast, of far more recent vintage; respondents did not raise those arguments in the 1972 rulemaking proceeding, and they have yet to prove those arguments to the satisfaction of the expert governmental agencies that are best equipped to evaluate these complex economic matters. See U.S. Br. 4-5, 34 n.41, 40 & n.50.

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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